

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

THOMAS CORTEZ,

Plaintiff,

-against-

SUFFOLK COUNTY CORRECTIONAL
FACILITY,

Defendant.

JOSEPH F. BIANCO, District Judge:

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ OCT 25 2016 ★

LONG ISLAND OFFICE

ORDER
15-CV-1957(JFB) (AKT)

Before the Court is a Report and Recommendation ("R&R", ECF No. 17) from Magistrate Judge Tomlinson recommending that the Court dismiss *pro se* plaintiff Thomas Cortez's complaint for failure to prosecute. The R&R instructed that any objections to the R&R be submitted within fourteen (14) days of service of the R&R. *See* R&R, dated October 5, 2016, at 4. Defendant filed a certificate of service stating that it effected service on October 5, 2016. (ECF No. 18.) Thus, the date for filing any objections has expired, and plaintiff has not filed any objection to the R&R. For the reasons set forth below, the Court adopts the thorough and well-reasoned R&R in its entirety, and it dismisses plaintiff's complaint for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

Where there are no objections, the Court may adopt the report and recommendation without *de novo* review. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985) ("It does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings."); *see also Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Where parties receive clear notice of the consequences, failure timely to object to a magistrate's report and recommendation operates as a

waiver of further judicial review of the magistrate's decision.”); *cf.* 28 U.S.C. § 636(b)(1)(c) and Fed. R. Civ. P. 72(b)(3) (requiring *de novo* review after objections). However, because the failure to file timely objections is not jurisdictional, a district judge may still excuse the failure to object in a timely manner and exercise its discretion to decide the case on the merits to, for example, prevent plain error. *See Cephas v. Nash*, 328 F.3d 98, 107 (2d Cir. 2003) (“[B]ecause the waiver rule is non jurisdictional, we ‘may excuse the default in the interests of justice.’” (quoting *Thomas*, 474 U.S. at 155)).

Although plaintiff has waived any objection to the R&R and thus *de novo* review is not required, the Court has conducted a *de novo* review of the R&R in an abundance of caution. Having conducted a review of the full record and the applicable law, and having reviewed the R&R *de novo*, the Court adopts the findings and recommendations contained in the well-reasoned and thorough R&R in their entirety.

Rule 41(b) authorizes a district court to “dismiss a complaint for failure to comply with a court order, treating the noncompliance as a failure to prosecute.” *Simmons v. Abruzzo*, 49 F.3d 83, 87 (2d Cir. 1995) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633 (1962)) (additional citation omitted); *see also* Fed. R. Civ. P. 41(b). Courts have repeatedly found that “dismissal of an action is warranted when a litigant, whether represented or instead proceeding *pro se*, fails to comply with legitimate court directives.” *Kuar v. Mawn*, No. 08-CV-4401, 2012 WL 3808620, at *3 (E.D.N.Y. Sept. 4, 2012) (internal quotations and alteration omitted). A district court contemplating dismissal of a plaintiff’s claim for failure to prosecute and/or to comply with a court order pursuant to Rule 41(b) must consider:

- 1) the duration of plaintiff’s failures or non-compliance; 2) whether plaintiff had notice that such conduct would result in dismissal; 3) whether prejudice to the defendant is likely to result; 4) whether the court balanced its interest in managing its docket against plaintiff’s interest in receiving an opportunity to be heard; and 5) whether the court adequately considered the efficacy of a sanction less draconian

than dismissal.

Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp., 222 F.3d 52, 63 (2d Cir. 2000); *see, e.g., Jackson v. City of New York*, 22 F.3d 71, 74-76 (2d Cir. 1994); *see also Peart v. City of New York*, 992 F.2d 458, 461 (2d Cir. 1993) (“[D]ismissal for want of prosecution is a matter committed to the discretion of the trial judge [and] the judge’s undoubtedly wide latitude is conditioned by certain minimal requirements.” (quoting *Merker v. Rice*, 649 F.2d 171, 173-74 (2d Cir. 1981))). In deciding whether dismissal is appropriate, “[g]enerally, no one factor is dispositive.” *Nita v. Conn. Dep’t of Env. Prot.*, 16 F.3d 482, 485 (2d Cir. 1994).

Here, Magistrate Judge Tomlinson warned plaintiff on multiple occasions that his failure to attend court-ordered conferences would result in dismissal of his complaint. *See* R&R at 2-3. Thus, plaintiff has shown no interest in continuing with this action. Under these circumstances, no sanction less than dismissal will alleviate the prejudice to defendant of continuing to keep this action open. Moreover, the Court needs to avoid calendar congestion and ensure an orderly and expeditious disposition of cases. Therefore, all the above-referenced factors favor dismissal of the instant case.

Accordingly, it is hereby ordered that plaintiff’s complaint is dismissed for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. The Court certifies pursuant to 28 U.S.C. §1915(a)(3) that any appeal from this Order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of any appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

SO ORDERED. /

Joseph F. Bianco
Joseph F. Bianco
United States District Judge

Dated: October 25, 2016
Central Islip, New York